MOTION FILED
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No. 82-7003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IVON RAY STANLEY,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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On Petition For A Writ Of Certiorari
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For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corpora-

tion established to assist black citizens in securing their constitutional rights. In 1967, it undertook to represent indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. It has frequently represented such prisoners before this Court. E.g., Furman v. Georgia, 408 U.S. 238 (1972); Coker v. Georgia, 433 U.S. 584 (1977); Estelle v. Smith, 451 U.S. 454 (1981); Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W. 5206 (U.S., June 28, 1983). The Fund has also appeared before this Court as amicus curiae in capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); Adams v. Texas, 448 U.S. 38 (1980).

The Legal Defense Fund currently represents a substantial number of indigent condemned prisoners in the states of the Eleventh Circuit and elsewhere, including

many who are at various stages of federal habeas corpus proceedings. It is frequently called upon, and it tries to the extent of its capacities, to provide consultative assistance to attorneys representing other capital defendants across the nation.

The issues presented by this case are of the utmost concern to many death-sentenced prisoners throughout the country. In view both of (i) the Legal Defense Fund's exposure to a broad range of attorney performance in capital sentencing proceedings and (ii) the direct bearing of this case on the claims of our clients, we request to be permitted to file this brief as amicus curiae.

Compliance With Rule 36.1

Pursuant to Rule 36.1 of the Rule of this Court, counsel for the Legal Defense Fund as amicus curiae has attempted to

obtain written consent from the parties. However, on July 26, 1983, Assistant Attorney General Susan v. Boleyn stated during a telephone call that consent to file would not be granted by respondent.

Conclusion

In view of the important issues presented by this case, we urge the Court to grant this Motion and permit the Legal Defense Fund to file the annexed brief as amicus curiae.

Dated: July 29, 1983

Respectfully submitted,

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of the NAACP Legal Defense and Educational Fund, Inc. as amicus curiae is set forth in its Motion for Leave to File Brief as Amicus Curiae, attached hereto.

STATEMENT OF FACTS

Procedural History

Petitioner and a co-defendant, Joseph Thomas, were charged with the April, 1976 murder, kidnapping and robbery of a Decatur County, Georgia insurance salesman. At separate trials, each was convicted. Following separate sentencing hearings, during which neither Stanley's nor Thomas' appointed counsel called any mitigation witnesses or introduced mitigation evidence, both men were sentenced to death. Their convictions and death sentences for murder and kidnapping with bodily injury were affirmed by the Georgia Supreme Court. Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977), cert. denied, 439 U.S. 882 (1978); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977), cert. denied, 436 U.S. 914 (1978). Thereafter both men filed habeas corpus petitions in the state courts

alleging, inter alia, that they had been denied effective assistance of counsel because of the failure of their respective trial attorneys to investigate, prepare and present readily available mitigation witnesses at their sentencing hearings. These petitions were denied after evidentiary hearings. Thereafter petitioner and Thomas filed habeas corpus petitions in federal district court which were summarily dismissed. The court of appeals reversed the summary dismissal of Thomas' petition and remanded for further factual findings, Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), but affirmed by a 2-1 vote the dismissal of Stanley's petition. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) Pet. for Cert. 1a-27a.

The Ineffective Assistance Claim

The underlying facts concerning

Stanley's ineffective assistance claim, so far as they have been established, are not in dispute. At the guilt phase of his trial, Stanley testified that

> he did not actually participate in the the actual torture slaying [of the victim], but that he rather attempted to persuade Thomas to let the victim live. Defense counsel produced no character evidence that might have made the theory more credible, nor did counsel produce any corroborative character evidence to supplement Stanley's own testimony about his background and personal history.

Stanley v. Zant, supra, 697 F.2d at 958. Counsel failed, indeed, to call any witnesses at all on Stanley's behalf at his sentencing hearing. During his state habeas hearing, the uncontradicted testimony of petitioner and his witnesses was that trial counsel conducted no independent investigation of possible character witnesses, and that such an investigation, had it been conducted, would have revealed

the existence of a number of witnesses able and willing to testify concerning petitioner's good character.[1/] While the state habeas court concluded that these witnesses' testimony "might well have had no effect, or no good effect, on the jury" at petitioner's sentencing hearing, id. at 697 (emphasis added), this finding implicitly recognized, as did the court of appeals, that the character evidence which trial counsel failed to investigate and present "might well" have been deemed by the jury to have substantial mitigating effect.[2/] The record does suggest that

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1/ A summary of the testimony of several such witnesses presented by Stanley at the state habeas hearing is found in the opinion of the court of appeals panel majority. 697 F.2d at 967-69.

2/ As the court of appeals concluded, "[w]e cannot say that this evidence would have had no impact on a jury, nor can we say that a tactical decision to use such evidence would have been unreasonable." Id. at 969.

that counsel may have discussed the possibility of mitigation witnesses on one occasion with petitioner and with petitioner's mother, id. at 966, 968, but there is no indication that counsel followed up by interviewing any of Stanley's character witnesses with a view to securing favorable testimony at his sentencing hearing, nor that he conducted any other investigation to reveal whether or not evidence of Stanley's good character could have been obtained.

As noted, at the sentencing hearing, counsel presented no evidence of any kind in mitigation of Stanley's sentence. Although the record before the jury from the guilt-or-innocence phase of the trial contained evidence concerning Stanley's low IQ as well as his own testimony concerning his personal background, Stanley v. Zant, Pet. for Cert. 39a-40a; id. 697 F.2d

at 967, 966 n.10, defense counsel did virtually nothing during Stanley's sentencing hearing to draw this evidence to jury's attention in order to show why the death penalty should not be imposed. Instead, counsel stated at the beginning of his final argument that "I'm not going into the evidence any further in this case because you heard it all." Stanley v. Zant, Pet. for Cert. at 62a.[3/] Stanley's attorney then said to the jury:

> I have done my duty. I'll walk out of this courtroom today feeling that I have even gone overboard against my friends, against those I sit in church with, against those I have sat in the lodge with, against those I have broken bread with.

Pet. for Cert. at 62a-63a; 697 F.2d at 976.

3/ Counsel did offer one apparent reference to petitioner's mental retardation which had been suggested at the guilt phase of the trial when he told the jury in his closing argument that he considered his client to be "an imbecile." Pet. for Cert. at 64a.

True to his promise that he would not discuss the evidence in the case with the jurors, counsel made a brief plea for mercy and sat down.

Trial counsel was not called as a witness at the state habeas hearing, and the record contains no direct evidence of counsel's reasons, if any, for not investigating or presenting sentencing witnesses on Stanley's behalf. The state habeas court made no factual findings on this issue, limiting itself to the observation that Stanley's proffered witnesses "might well" have been of no benefit at trial, and to the legal conclusion that Stanley was not denied the effective assistance of counsel. Pet. for Cert. at 38a-41a. These conclusions were subsequently adopted by the federal district court in dismissing Stanley's petition for writ of habeas corpus without a hearing. Id. at 29a.

C. The Court Of Appeals' Opinion.

In affirming the district court's summary dismissal of Stanley's petition, the panel majority recognized that

> a showing that counsel's decision was not based on a reasoned tactical judgment will give rise to an ineffective assistance of counsel claim. This is as true of character evidence as it is of any other sort of evidence.

Stanley v. Zant, supra, 697 F.2d at 966 (emphasis in original). The panel majority also recognized, as noted earlier, that the character evidence which defense counsel failed to present at petitioner's sentencing hearing might have had a favorable impact on the jury. Id. at 969. Finally, the court recognized that the record revealed no acceptable strategic reason for defense counsel's failure to prepare or present readily available mitigating

character evidence.[4/]

The panel majority then attempted to place these facts within the analytical framework of the plurality opinion in Washington v. Strickland, 693 F.2d 869 (11th Cir. 1982) (en banc), cert. granted, ___ U.S. ___, 51 U.S.L.W. 3871 (U.S., June 7, 1983) (No. 82-1554). Washington identified "five major lines of cases

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4/ The majority opinion does suggest as one possibility that defense counsel had made a strategic judgment that character testimony from petitioner's family and friends "would do not good, and indeed would detract from the force of the argument that [counsel] intended to make." 697 F.2d at 970. Such speculation, however, is without support in the record, since there is no indication that defense counsel had interviewed petitioner's "family and friends" sufficiently to be able to evaluate their possible testimony, see Stanley v. Zant, supra, 697 F. 2d at 975 (Arnold, J., dissenting), and since the argument which counsel did make, Pet. for Cert. at 62a-64a, was so brief and apologetic as to belie any serious claim that his failure to present mitigation evidence could have been motivated by a tactical judgment concerning the impact of his argument.

involving the duty to conduct adequate investigation before proceeding to trial," two of which were arguably relevant to petitioner's case. These categories, as summarized in Washington, were the following:

> (4) Counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely on another plausible line of defense at trial.
>
> (5) Counsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice.

Washington v. Strickland, supra, 693 F.2d at 1254-58. While expressly recognizing that the record before it did not indicate whether defense counsel's failure to conduct a substantial investigation was the product of his "reasonable strategic choice to rely upon another plausible line of defense at trial," Stanley v. Zant, supra, 697 F.2d at 969; Washington v. Strickland,

supra, 693 F.2d at 1254, the panel majority remedied the lack of direct evidence on this point by invoking a presumption of attorney competence. Applying this presumption, the majority concluded that Stanley had not carried his burden to prove that defense counsel's failure to investigate or present character evidence was not a "reasonable strategic choice." In this manner the panel majority was able to place the case before it within the fourth Washington category rather than the fifth, and accordingly declined to find a violation of Stanley's right to effective assistance of counsel.

In dissent, Judge Arnold pointed out that even if Washington's presumption of attorney competence could properly be applied to a case in which an attorney had made an unexplained decision not to investigate one of several lines of defense,

Stanley's was not such a case. Rather,

> counsel [here] made no investigation whatever, so far as I can tell, of mitigating evidence... Counsel discussed the possibility of character witnesses with petitioner and his mother, and Stanley gave him some names, but the subject never came up again, and counsel did not discuss possible mitigating testimony with any of the other witnesses who later testified at the state habeas hearing. The Court does not claim that this "investigation," if it can be called that, "satisfies the stringent requirements of Washington v. Strickland." Ante at 966. It seems to say, instead, that counsel could reasonably have chosen to pursue some other strategy. The difficulty with this reasoning is that counsel did not pursue any other strategy. This is not a case, for example, of counsel's choosing to call witnesses as to diminished mental capacity, instead of character witnesses. Here no witnesses at all were called... In short, this case should be governed by the Court's statement in Washington, at 1252-3, that "permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense."

697 F.2d at 975. In addition, Judge Arnold

noted that defense counsel's seeming apology in his closing remarks for having "gone overboard [in Stanley's defense] against my friends, against those I sit in church with, against those I have sat in the lodge with, against those I have broken bread with" suggested an impermissible and nonstrategic explanation for counsel's failure to investigate and present favorable character evidence -- namely, counsel's apparent desire "not to offend church and lodge by going any further 'overboard' in Stanley's cause." The implications of these statements, which appear to constitute the only direct evidence of defense counsel's actual motivation and perception of his role at Stanley's sentencing hearing, "are at least serious enough to neutralize any presumption that his decision to present no mitigating evidence was a reasonable strategic choice." 697 F.2d

at 976.

REASONS FOR GRANTING THE WRIT

This Court has recently granted a petition for certiorari in Strickland v. Washington, supra, to consider the constitutional standard by which a defense counsel's performance in the sentencing portion of a capital trial should be assessed, and to decide under what circumstances federal habeas corpus relief should be granted when a denial of right to effective assistance of counsel has been established. In this case, a divided panel of the Eleventh Circuit Court of Appeals upheld petitioner Stanley's sentence of death by applying the Washington effective assistance analysis, and by invoking a newly-fashioned and unreasonably difficult burden of proof. His case thus concerns the same issues of effective assistance of counsel, and of the alloca-

tion and nature of habeas corpus petitioner's burden of proof which the Court will consider in Washington. This case is also directly related to the ineffective assistance of counsel issues this Court will consider in United States v Cronic, ___ U.S. ___, 75 L.Ed.2d 430 (1983). Unless certiorari is granted, however, petitioner will in all likelihood be executed by the state of Georgia before judgment is rendered in Washington and Cronic.

The granting of certiorari is also appropriate because the majority opinion in this case, penned by the author of the plurality opinion in Washington v. Strickland, illuminates an aspect of the Eleventh Circuit's understanding of its holding in Washington which is by no means apparent from a reading of the plurality and concurring opinions in that case -- namely, that a death-sentenced habeas corpus petitioner

must bear the burden of establishing not only the basic facts underlying his claim of ineffective assistance of counsel, but must also, in most instances, secure and offer into evidence a virtual admission of ineffectiveness by his former trial counsel as a precondition for the establishment of his claim.

Finally, even if the quantum and allocation of the burden of proof had been correctly determined by the panel majority, remand of this case would be appropriate to remedy the fundamental unfairness that has resulted from the retroactive application in petitioner's case of legal requirements devised by the court of appeals some four years after the state habeas hearing during which petitioner was accorded his only opportunity to establish the facts underlying his claim.

I. The Court Should Grant Certiorari To Consider This Case in Conjunction With Strickland v. Washington

The summary of the pertinent facts of this capital case reveals that its resolution is inextricably intertwined with the issues soon to be addressed by this Court in Strickland v. Washington, supra. Among these issues are the following:

> 1) May constitutionally adequate counsel ever fail to conduct a substantial investigation into a plausible line of defense, at least where such line of defense is compatible with other lines of defense available and actually employed at trial?
>
> 2) If so, under what circumstances may a reviewing court conclude that such a failure to investigate was the product of a strategic choice rather than of impermissible factors such as lack of minimal skill, diligence or commitment to the client's cause?
>
> 3) Where a failure to investigate or present a line of defense is found not to be the product of reasoned professional judg-

> ment, what degree of prejudice, if any, need be established in order to warrant federal habeas corpus relief?

In Washington, trial counsel testified during collateral proceedings that he had failed to investigate a plausible line of defense in mitigation of punishment because of a feeling of hopelessness created by the defendant's decision to plead guilty. 693 F.2d at 1249. The Washington plurality held that such testimony, where found to be credible, can rebut the presumption of attorney competence and give rise to a finding of ineffective assistance of counsel. Id. at 1257. While such direct testimony by defense counsel obviously has great relevance in deciding the question of counsel's effectiveness, the case at bar reveals that the Eleventh Circuit as a practical matter intends to require a virtual admission of ineffectiveness by the former defense counsel as a precondition

condition of habeas corpus relief in all but the rarest of cases.

In resolving petitioner's claim absent direct evidence of counsel's motivations, the court of appeals relied on a presumption of attorney competence, despite uncontradicted evidence (i) that defense counsel conducted no substantial investigation into the one line of mitigation available to his client at his sentencing hearing, (ii) that counsel presented no mitigation evidence whatever, and (iii) that he had no apparent trial strategy at the sentencing hearing beyond a generalized appeal for mercy. While the Washington plurality indicated that the presumption of attorney competence might be nothing more than an alternate mode of phrasing the well-established principle that a habeas petitioner must prove ineffective assistance by a preponderance of the

evidence, 693 F.2d at 1250, n.11, the presumption has been permitted here to outweigh clear and uncontradicted evidence of ineffectiveness. The effect of this holding, in short, has been to increase a petitioner's burden of persuasion far beyond the preponderance of the evidence standard, requiring proof which will rarely be obtained short of the full cooperation of trial counsel or, at a minimum, counsel's acknowledgment that he failed without good reasons to investigate or present a defense.

The arbitrary results of such an approach are dramatically illustrated by a comparison of the panel majority's treatment of this case and that of his co-defendant Thomas. Both men were convicted of committing the same crime,[5/] and both made

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5/ Indeed, to the extent that their culpability differs, it would appear that

substantially identical evidentiary showings concerning the adequacy of their trial attorneys' performances at their sentencing hearings. See Thomas v. Zant, supra, 697 F.2d at 978 n.1. Their cases have now diverged solely because Thomas has been able to secure from his trial attorney a four-sentence affidavit admitting that she did not investigate or prepare any case in mitigation for her client. Id. at 988. Despite a factual finding by the state habeas court that Thomas' counsel's failure to present a case in mitigation reflected "an apparent tactical decision," id. at 980 n. 3, the court of appeals held this

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5/ continued

Thomas' was greater than Stanley's, since it was Thomas, not Stanley, who actually shot and beat the victim prior to his death, and who shovelled earth over his head to cause his death. Thomas v. State, 240 Ga. 393, 242 S.E.2d 1, 2-4 (1977).

attorney's affidavit was sufficient to require that Thomas' case be remanded for a hearing. As noted by Judge Arnold, dissenting from the majority's refusal to accord Stanley the same right,

> [t]he only material difference between this case and Thomas ..., also being decided today, is that in Thomas petitioner proffered in the District Court an affidavit of trial counsel that she did not "investigate or interview witnesses for the penalty phase of the trial..." Very nearly the same thing can be said about Stanley's trial counsel. Yet, Thomas will live, for the time being at least, but Stanley, if this Court has the last word, will die.

Stanley v. Zant, supra, 697 F.2d at 975 n.2 (Arnold, J., dissenting).

The majority's opinion will not be "the last word" on the legal issues presented by this case, however, since the underlying Sixth Amendment questions are now being considered by this Court in Strickland v. Washington, supra, and United

States v. Cronic, and since the burden-of-proof question will eventually require resolution by this Court. It is unlikely, however, that any case to follow this one will present a starker example of the injustice worked by the Eleventh Circuits newly-articulated standard. The Sixth Amendment issues presented here should therefore be resolved by this Court before Stanley's death sentence is carried out, and his case presents an appropriate occasion for their resolution.

II. The Court Should Grant Certiorari To Consider Whether Petitioner Should Have Been Afforded An Evidentiary Hearing

The result reached by the panel majority in this case, affirming petitioner's case while remanding co-defendant Thomas' for further hearing, is especially anomolous in view of the fac'. that the

state court which considered the claim of petitioner's co-defendant, Thomas, made a factual finding that trial counsel's failure there to present a case in mitigation reflected "an apparent tactical decision." Thomas v. Zant, supra 697 F.2d at 980, n. 3. By contrast, no such finding was made by the state courts in considering Stanley's habeas petition. Stanley v. Zant, Order of Butts County Superior Court (July 26, 1979), reprinted at Pet. for Cert. 38a-41a. In the absence of any findings on this crucial factual issue, it is even more true of Stanley's ineffectiveness claim than it is of Thomas' that "crucial evidence 'indispensible to a fair, rounded development of the material facts'" was not considered by the state fact-finder. Thomas, supra, 697 F.2d at 979, quoting Townsend v. Sain, 372 U.S. 293, 321-22 (1963). In Thomas, after all,

the "material fact not adequately developed at the state proceeding," 28 U.S.C. §2254 (d)(3), was not trial counsel's affidavit itself, but counsel's reasons for failing to present any mitigation evidence or testimony. The same material fact was left undeveloped and undetermined in Stanley's state habeas corpus proceeding. If the court of appeals was correct in its statement that "[i]n an allegation of ineffective assistance of counsel, nothing could be more 'indispensible to a fair, rounded development of the material facts' than counsel's testimony concerning her strategy at trial," Thomas, supra, 697 F.2d at 986, then Stanley, like Thomas, is entitled to an opportunity to present such testimony before his death sentence is carried out.

This conclusion is even more compelling in view of the special circumstances

of this case. Whatever the merits of the court of appeals' holding, its requirement could not have been reasonably apparent to Stanley or to his post-conviction counsel in 1979, when he was afforded his only opportunity to present evidence in support of his claim of ineffective assistance. No decision of this Court has ever suggested the existence of such a requirement, and until the decision in Stanley, no such requirement could have been discerned from the decisions of the court of appeals. Under the law as it existed in 1979, it is understandable that Stanley considered himself to have met his burden of proof at his state habeas hearing. If that burden has now been increased by the court of appeals' unforeseeable expansion of the presumption of attorney competence, Stanley should have a new opportunity to meet that burden through the testimony of his former

attorney, or through other direct evidence establishing the reasons for counsel's inaction during petitioner's capital sentencing hearing.

Moreover, as noted by the court of appeals in Thomas, supra, 697 F.2d at 988, n.14, there are serious questions as to the adequacy and fairness of the state fact-finding procedures employed in both of these cases. Georgia law imposes substantial financial costs on habeas corpus petitioners who wish to avail themselves of compulsory process to secure the attendance of witnesses. O.C.G.A. §24-10-24 (Michie 1982). At the same time, the state provides no financial assistance for indigent prisoners who are unable to bear such costs. State v. Davis, 246 Ga. 200, 269 S.E.2d 461 (1980); Neal v. Smith, 226 Ga. 96, 172 S.E.2d 684 (1970). As noted by Judge Arnold in his dissent in this case,

> It is unjust for the State to deny the petitioner the means to subpoena his trial counsel to testify at his state habeas hearing, and for the federal courts then to fault him for not showing, through the testimony of counsel, that counsel did not make a strategic choice. Surely this kind of disability, placed upon Stanley because of his poverty, should excuse his not meeting his burden of proof. He could have had witnesses subpoenaed at federal expense to testify before the federal habeas court, but the District Court declined to hold an evidentiary hearing.

697 F.2d at 976. There would appear, in short, to be every possibility that Stanley, because of his poverty, simply could not have presented to the state courts the evidence now deemed crucial by the court of appeals, even had the importance of that evidence been as apparent at the time of his state habeas hearing as it is now. Whether or not these factors actually account for his failure to call his trial counsel as a witness is not, of course, a

matter which can be determined on the basis of the existing record. But it is plain that there is enough doubt on the question to warrant a remand so that the district court can consider whether Stanley should be permitted to present this testimony now, Townsend v. Sain, 372 U.S. 293 (1963), and if so, whether the record thus developed actually supports the court of appeals' speculative conclusion that trial counsel's performance at Stanley's sentencing hearing met minimal constitutional standards.

For these reasons, even if the court of appeals' legal analysis in this case proves to be consistent with this Court's ultimate resolution of Strickland v. Washington, the Court should grant certiorari and vacate the judgment below with instructions to remand for an evidentiary hearing at which the unresolved facts now identified by the court of appeals as

crucial may receive a reliable and fair resolution.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 29, 1983

Respectfully submitted,



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